

NATIONAL WILDLIFE FEDERATION ET AL.

v.

BUREAU OF LAND MANAGEMENT,

UTAH FARM BUREAU FEDERATION, and

UTE MOUNTAIN UTE INDIAN TRIBE,
Intervenors-Appellants

AMERICAN FARM BUREAU FEDERATION,
Amicus-Curiae

IBLA 94-264

Decided August 21, 1997

Appeals from a decision by District Chief Administrative Law Judge John R. Rampton, Jr., addressing appeals from decisions of the Moab District Manager and the San Juan Resource Area Manager, Bureau of Land Management, relating to grazing in the Comb Wash Allotment. Hearings Division Docket Nos. UT-06-91-01 and UT-06-93-01.

Affirmed as modified.

1. Environmental Quality: Environmental Statements--
Grazing Permits and Licenses: Adjudication--Grazing
Permits and Licenses: Environment--National
Environmental Policy Act of 1969: Environmental
Statements

The BLM violated section 102(2)(C) of NEPA, as amended, 42 U.S.C. § 4332(2)(C) (1994), by relying on the environmental impact statement prepared for its resource management plan for the San Juan Resource Area as its environmental documentation supporting its authorization for grazing on the Comb Wash Allotment within the resource area. Examination of the environmental impact statement revealed that it did not provide any site-specific environmental analysis of the impact of grazing on the resource values in five canyons on the allotment.

2. Environmental Quality: Environmental Statements--
Grazing Permits and Licenses: Adjudication--Grazing
Permits and Licenses: Environment--National
Environmental Policy Act of 1969: Environmental
Statements

Tiering is an appropriate method of NEPA compliance. Tiering requires a minimum of two NEPA documents. A general environmental document and a later-developed site-specific environmental document which is tiered back to the earlier general document. In the absence of a site-specific environmental document, tiering is impossible. When the record shows the lack of a site-specific document, BLM may not justify site-specific actions by reliance on the general environmental document.

3. Grazing Permits and Licenses: Adjudication--Federal
Land Policy and Management Act of 1976: Grazing Leases
and Permits

The BLM violated the multiple-use mandate of section 302(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(a) (1994), when it authorized livestock grazing in five canyons in the Comb Wash Allotment without engaging in a reasoned and informed decisionmaking process showing that it had balanced competing resource values in order to best meet the present and future needs of the American people.

4. Administrative Procedure: Adjudication--Administrative
Procedure: Administrative Law Judges--Administrative
Procedure: Administrative Review--Office of Hearings
and Appeals--Rules of Practice: Appeals--Secretary of
the Interior

The authority of the Office of Hearings and Appeals is delegated to it from the Secretary of the Interior under 43 C.F.R. § 4.1, which provides that the office is an authorized representative of the Secretary for the purpose of hearing, considering, and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department. Thus, an Administrative Law Judge's authority in fashioning relief following a hearing on the merits is not limited by jurisprudential constraints underlying injunctive relief analysis.

APPEARANCES: Glen E. Davies, Esq., Salt Lake City, Utah, for Appellant, Utah Farm Bureau Federation, and for the American Farm Bureau Federation, amicus curiae; Eric Stein, Esq., Towaoc, Colorado, and Daniel H. Israel, Esq., Carefree, Arizona, for Appellant, the Ute Mountain Ute Indian Tribe; Wendy S. Dorman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for Appellant, the Bureau of Land Management; J. Jay Tutchtton, Esq., Susan M. Horner, Esq., and Thomas D. Lustig, Esq., Boulder, Colorado, and Joseph M. Feller, Esq., Tempe, Arizona, for the National Wildlife Federation, Southern Utah Wilderness Alliance, and Joseph M. Feller, Appellees.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On December 20, 1993, District Chief Administrative Law Judge John R. Rampton, Jr., issued a Decision involving appeals relating to grazing in the Comb Wash Allotment in southeastern Utah. ^{1/} In his Decision, Judge Rampton precluded BLM from allowing any further grazing of cattle on certain public lands in the allotment, specifically five canyons (Arch, Mule, Fish Creek, Owl Creek, and Road Canyons), pending compliance with the environmental review mandate of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994), and the requirements of sections 302(a) and 309(e) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1732(a) and 1739(e) (1994), for consideration of principles of "multiple use" and public participation.

The American Farm Bureau Federation (AFBF) and Utah Farm Bureau Federation (UFBF), the Ute Mountain Ute Indian Tribe (Tribe), and BLM each

^{1/} The case before Judge Rampton involved three consolidated appeals for which he conducted 18 days of hearings during May 1992 and April and May 1993 in Monticello and Salt Lake City, Utah, and Grand Junction, Colorado.

The first appeal, designated Hearings Division Docket No. UT-06-91-01, is an appeal of the Mar. 6, 1991, Final Decision of the Moab District Manager, Bureau of Land Management (BLM), involving grazing in the Comb Wash Allotment. The second, which never received a Hearings Division docket number, is an appeal of the Sept. 19, 1991, Decision of the San Juan Area Manager, BLM, issuing an annual grazing authorization for the 1991-92 grazing season on the Comb Wash Allotment. The third, which was filed after the commencement of the hearing, is Hearings Division Docket No. UT-06-93-01, which is an appeal of the Sept. 23, 1992, Decision of the San Juan Resource Area Manager, BLM, authorizing grazing on the allotment for the 1992-93 grazing season. Judge Rampton took no action regarding either grazing authorization because, at the time he issued his Decision, they had, by their terms, expired. (Decision at 31, n.5.) However, he addressed the issues raised by the appeals of those authorizations because he considered them to be capable of repetition, yet evading review, due to the short duration of the annual grazing authorizations. Id.

filed appeals from that Decision. 2/ Together with its notice of appeal, the Tribe filed a petition for stay. Neither of the other Appellants sought a stay. National Wildlife Federation, Southern Utah Wilderness Alliance, and Joseph M. Feller (collectively referred to as NWF) filed a document, inter alia, opposing the petition for stay and requesting that the Decision be put into full force and effect.

In a Decision dated March 1, 1994, the Board denied the petition for stay and granted the request to put Judge Rampton's Decision into effect, pursuant to 43 C.F.R. § 4.477(b) (1994), thereby prohibiting grazing in the canyons pending resolution of the appeals on their merits. National Wildlife Federation v. BLM, 128 IBLA 231 (1994). In a subsequent Decision, the Board granted a motion to dismiss the appeal of AFBF, but granted AFBF amicus curiae status. National Wildlife Federation v. BLM, 129 IBLA 124 (1994).

I. Factual and Procedural Background

The Comb Wash Allotment encompasses nearly 72,000 acres, of which approximately 63,000 acres are public lands, the remainder being state and private. The allotment is located southwest of Blanding, Utah, and northwest of Bluff, Utah. Within the allotment boundaries is the geographic feature from which the allotment derives its name, Comb Wash, a narrow valley that runs north-south just west of the Comb Ridge for about 20 miles. (Ex. R-4; Ex. A-37, at 1.) Draining into Comb Wash from the west are five canyons, Arch, Mule, Fish Creek, Owl Creek, and Road, sections of which, ranging from approximately 4 to 7 miles in length, are also within the allotment boundaries. (Ex. R-4.) The canyon bottoms are narrow, generally less than a half-mile wide and in places no more than 200 yards wide. (Tr. Vol. 2, at 32-34.) 3/ The canyons encompass about 7,000 acres, or 10 percent of the allotment land. (Tr. Vol. 1, at 135-36.)

Each canyon contains a perennial or ephemeral stream, with an associated riparian area. The canyons provide recreational opportunities for camping, hiking, photography, sightseeing, and the viewing of archaeological sites, including many remnants of the ancient Anasazi culture.

The case presented to Judge Rampton by NWF during the 18 days of hearing in this case was intended principally to show the impact of grazing on

2/ The Tribe is the holder of the grazing preference for the Comb Wash Allotment. The UFBF is an association whose membership includes numerous holders of Federal privileges for grazing livestock on the public lands of BLM's San Juan Resource Area, which encompasses the allotment, and other areas of the State of Utah. Along with similar associations in the other Western public-land states, it is a member organization of AFBF.

3/ The transcript of the 18-day hearing in this case is composed of 18 volumes, each of which is separately paginated. Citations to the transcript will be to volume and page number.

the five canyons. The NWF introduced at the hearing, through the testimony of numerous witnesses, including experts in riparian ecology, range management, archaeology, outdoor education, geology, fluvial geomorphology, and soil science, considerable evidence of the impacts of grazing in the canyons on archaeological sites, recreational opportunities, riparian vegetation, soil conditions, water quality, and wildlife habitat.

The White Mesa Community, whose members are enrolled to the Tribe, owns the White Mesa Cattle Company, which conducts grazing operations on the allotment. (Tr. Vol. 1, at 107-08.) The Comb Wash Allotment is one of six allotments on approximately 250,000 acres of public and national forest lands used by the White Mesa Community for its grazing operations. (Tr. Vol. 1, at 136.) From 1987 to 1991, the White Mesa Community employed about four tribal members per year in its grazing operations. (Ex. A-123.)

Despite limited employment opportunities for tribal members, the operation provides income for the White Mesa Community, which the community uses to make home repairs for senior citizens, purchase clothing for school children, and maintain a small store. (Tr. Vol. 1, at 120.)

In 1966, BLM established an active grazing preference of 3,796 animal unit months (AUM's) for BLM-administered public lands in the allotment for the annual grazing season from October 16 to May 31. (Ex. A-37, at 1; Tr. Vol. 16, at 34-35.) That preference allowed 506 cattle to graze the allotment. Prior to 1985, the number of cattle using the canyons was unknown because cattle were allowed to graze the entire allotment, including the canyon areas, during the annual 7-1/2 month grazing season. (Tr. Vol. 16, at 33-34, 40-41.)

In May 1986, BLM issued a draft resource management plan (RMP) and environmental impact statement (EIS) to establish general management standards and guidelines concerning grazing and other permitted resource uses of the 1.8 million acres of public land in its San Juan Resource Area.

In developing that document, BLM grouped the Comb Wash Allotment with other allotments for purposes of considering the environmental consequences of alternative grazing management plans for the resource area. In September 1987, BLM issued a proposed RMP and final EIS (FEIS) for the resource area. Following another comment period, BLM reissued the proposed RMP in April 1989. However, prior to reissuance, on February 20, 1989, the San Juan Resource Area Manager issued a 10-year grazing permit to the Tribe for the Comb Wash Allotment authorizing grazing in the amount of 3,791 AUM's. The Utah State Director, BLM, approved the RMP in a March 18, 1991, Record of Decision and Rangeland Program Summary. (Ex. A-39.) ^{4/}

^{4/} In the RMP, BLM determined that, within 5 years after approval of the RMP, it would authorize grazing by agreement with the permittees at the 5-year "average licensed use level" or, absent agreement, by decision at the "present grazing preference." (Ex. A-39, at 57.) The RMP listed the 5-year average licensed use level for the Comb Wash Allotment as 2,870 AUM's (383 cattle) and the present grazing preference as 3,796 AUM's (506 cattle). *Id.* at 48. Further, BLM stated that either the average licensed use or the present grazing preference would be used until monitoring data confirmed a need for change. *Id.* at 57.

During the development of the RMP, BLM changed its grazing scheme for the Comb Wash Allotment. ^{5/} In the fall of 1986, it began to manage the canyon areas, as well as other land in the allotment, as separate pastures, regulating the movement of cattle among the pastures by the use of existing or newly-constructed fences. The BLM authorized the Tribe to drive cattle into the canyons and hold them there for a month at a time with fences constructed across the canyon mouths. (Tr. Vol. 9, at 163-64; Tr. Vol. 16, at 33-34, 40.) ^{6/} It also began to monitor forage utilization. It established trend study plots and established objectives for increasing the frequency of key plant species in the allotment. (Tr. Vol. 9, at 165-66, 179, 182.) However, none of those study plots was in the canyons or in any riparian area on the Comb Wash Allotment. (Ex. A-110, Part 2, at 23, Part 3, at 2.) ^{7/} Following a number of years of monitoring, BLM found that key species in the study plots had not changed or had decreased in frequency. In response to that finding, BLM adjusted its objectives downward to reflect the status quo in 1991. (Tr. Vol. 9, at 184-86.)

The BLM developed a plan for a 4-year grazing cycle for the allotment in order to improve the vegetation and in response to increased recreational use of the canyons. The features of that plan were that the season of use would be changed so that the canyons would be grazed only during the dormant season, from November 1 to the middle of March, (Tr. Vol. 9, at 168-70; Tr. Vol. 16, at 41); only 50 cattle would be grazed in each canyon for a period of only 1 month, (Tr. Vol. 16, at 41, 45-46); at least one canyon would be rested every fourth or fifth year, (Tr. Vol. 16, at 47); pastures outside the canyons would be grazed each year in an alternating pattern of spring grazing for two seasons followed by winter

^{5/} Actual use figures for the Comb Wash Allotment for the period 1981 to 1992 were 3,000 AUM's (400 cattle) (1981/82); 3,266 AUM's (435 cattle) (1982/83); 2,726 AUM's (363 cattle); 3,117 AUM's (416 cattle) (1984/85); 2,424 AUM's (323 cattle) (1985/86); 3,169 AUM's (423 cattle) (1986/87); 2,613 AUM's (348 cattle) (1987/88); 2,588 AUM's (345 cattle) (1988/89); 1,775 AUM's (237 cattle) (1989/90); 1,396 AUM's (186 cattle) (1990/91); 1,875 AUM's (250 cattle) (1991/92). (Ex. R-18; Tr. Vol. 16, at 37-38; Tr. Vol. 17, at 93.) Actual grazing use decreased in 1989 and 1990 because of a 2-year drought. (Tr. Vol. 9, at 166.) Authorized active use for the 1992-93 grazing season was 350 cattle. (Decision at 28.)

^{6/} Each of the five canyons was managed as a separate pasture, with the exception of the Fish Creek and Owl Creek Canyons. They were managed together as one pasture because Owl Creek Canyon splits off Fish Creek Canyon. (Ex. R-4; Tr. Vol. 17, at 92.)

^{7/} Exhibit A-110 consists of four parts. The first is a copy of BLM's Answers to Interrogatories, dated Feb. 24, 1992, which responds to the first set of interrogatories propounded by NWF. The second is a copy of the part of NWF's First Set of Interrogatories, dated Jan. 24, 1992, which sets forth their Requests for Admission. The third is a copy of BLM's Answer to Requests for Admission, dated Feb. 24, 1992. The fourth is a copy of BLM's Answer to Request for Designation of Record, dated Feb. 24, 1992. Citations to exhibit A-110 will identify the part and page number.

grazing for two seasons, (Tr. Vol. 9, at 202-03); and forage utilization in the canyons would be limited to 40 percent and outside the canyons to 50 percent in spring and 60 percent in the winter. (Tr. Vol. 9, at 200-201; Tr. Vol. 16, at 120.)

The BLM never formally adopted the 4-year grazing cycle, but it nevertheless implemented the plan through annual grazing authorizations with the 1990-91 season being the first year of the cycle. (Tr. Vol. 9, at 189; Tr. Vol. 16, at 58.) However, BLM did not adhere strictly to the features of the system. There was evidence at the hearing of the authorization of more than 50 cattle to graze in certain canyons, (Ex. A-9, Tr. Vol. 1, at 112), scheduling grazing in a canyon that was to be rested, (Ex. A-113; Tr. Vol. 17, at 6-7), and overutilization of certain key species in certain canyons. (Tr. Vol. 16, at 245-50.)

The annual grazing authorizations, two of which were challenged in this case, were issued by the San Juan Resource Area Manager, Edward Scherick, who believed he had discretion under the RMP to determine whether grazing should take place in the canyons. (Ex. A-108, at 12.) However, in exercising that discretion, he relied exclusively on the recommendations provided to him by Paul Curtis, the San Juan Resource Area range conservationist. (Ex. A-108, at 13-16, 19-20, 26-27, 36-37.) Scherick did not conduct any independent analysis of the effects of grazing on other resources. He testified that he always accepted Curtis' recommendations concerning grazing. (Ex. A-108, at 36-37; see Tr. Vol. 17, at 286.)

Curtis stated that it had been decided in the RMP that the canyons were available for livestock use. (Tr. Vol. 17, at 22.) He came to that conclusion because the RMP did not preclude grazing in the Comb Wash Allotment. (Tr. Vol. 17, at 24.) However, he acknowledged that he did not know if there was specific information in the RMP about the impacts of grazing in the canyons. (Tr. Vol. 17, at 28-29.)

Curtis testified that he "monitor[s] the grazing in the San Juan resource area, and presently that covers approximately two million acres. And I deal with the biggest percent of that two million acres, and approximately 66 different allotments and 66 different permittees, give or take a few." (Tr. Vol. 16, at 28.) Given the scope of his duties, it is not surprising that Curtis stated that he did not have the time or personnel to conduct the necessary monitoring in the canyons. See Tr. Vol. 16, at 253-54. Under those circumstances, he is generally left to rely on the permittee to adhere to the grazing schedule in the Comb Wash Allotment. He stated: "I try to call them, you know, periodically to make sure that things are going close to right." (Tr. Vol. 16, at 56.) It is clear from the record that things did not always go right. There is evidence of cattle grazing in Road Canyon in the spring of 1991, although it was explained that the cattle were merely being trailed through Road Canyon to Dead Bull Pasture to the south on that occasion. (Tr. Vol. 2, at 84-88; Tr. Vol. 17, at 123-34.) There is also evidence of cattle grazing in Road Canyon in May 1992 and in Arch and Fish Creek canyons in October 1991. (Tr. Vol. 2, at 119-25; Tr. 18, at 124-27, 129-30.) Moreover, in December 1990, BLM notified the permittee of its concern regarding the lack of cattle distribution

in Arch Canyon, "because cattle were hanging on the fence in the mouth of the canyon as had occurred three years ago." (Ex. A-1.) The BLM noted that a spokesman for the permittee had "told us that there just wasn't enough help to get the job done and he didn't know what he could do about it." Id.

The present proceeding had its genesis in the February 20, 1989, issuance by the Area Manager of a new 10-year grazing permit for the Comb Wash Allotment. Feller challenged issuance of the permit. In his Decision in Feller v. BLM, Hearings Division Docket No. UT-06-89-02, dated August 13, 1990, Judge Rampton concluded that BLM had failed to provide for the participation of affected interests, of which Feller was one. He set aside issuance of the permit, remanded the case to BLM for issuance, within 60 days, of a new decision, following notice to and the opportunity for comment by such interests. Judge Rampton directed that BLM's Decision on remand should set forth the basis for asserting compliance with, or exemption from, applicable provisions of the law and regulations. The BLM appealed that Decision to this Board. On December 4, 1990, the Board dismissed the appeal, docketed as IBLA 90-538, for failure to file a statement of reasons.

II. District Manager's Decision

The District Manager issued a Notice of Proposed Decision, dated October 9, 1990, in response to Judge Rampton's August 1990 Decision. Following a protest by Feller, the District Manager issued his March 1991 Notice of Final Decision finding that BLM had complied with section 102(2)(C) of NEPA and section 302(a) of FLPMA by virtue of completion of the Proposed RMP/FEIS. He stated therein at page 3 that the draft RMP/EIS had "specifically addressed livestock grazing on the Comb Wash Allotment." See also Tr. Vol. 8, at 43-44. He also claimed that "[a]n evaluation of the environmental and economic costs" of grazing in the allotment "were presented in the Draft RMP and EIS." (Decision at 3.)

He explained to Feller that "[a] protest to issuance of a grazing permit is not a proper vehicle to challenge the adequacy of the EIS." Id.

In his Decision, the District Manager did not issue a new 10-year permit. He determined that any adjustments in the Tribe's authorized grazing preference would be made following an evaluation of BLM's monitoring data for the allotment, which had been gathered during the five grazing seasons from 1985-86 through 1989-90. He stated that the 1968 Allotment Management Plan (AMP) for the Comb Wash Allotment would be revised "in accordance with the goals and objectives identified in the Proposed RMP and based on the objectives and preference level approved by the Area Manager through the monitoring process." (Decision at 2.) He explained that revision of the AMP would be accomplished through a Coordinated Resource Management (CRM) process involving all affected interests, Federal and state agencies, the permittee, and other interest groups, and that, following completion of that process, a term permit would be issued.

Finally, he advised that livestock grazing would continue on the allotment at "current levels through annual permits adjusted as necessary to deal with changes in vegetative production resulting from drought or

other unforeseen situations." (Decision at 4.) ^{8/} He stated that method of authorizing grazing would continue "until the AMP is revised through the CRM process."

The NWF timely appealed the District Manager's Decision, as well as the Area Manager's subsequent grazing authorizations for the allotment for the 1991-92 and 1992-93 grazing seasons.

III. Judge's Decision

Judge Rampton, in his December 1993 Decision, set aside the District Manager's March 1991 Final Decision, to the extent it permitted authorized grazing use to continue at established levels, and remanded the case to BLM for further action consistent with his directives. See note 1, supra.

Judge Rampton based his holding on the following conclusions: (1) BLM failed to comply with NEPA; (2) BLM violated FLPMA by "failing to make a reasoned and informed decision that the benefits of grazing the canyons outweigh the costs," (Decision at 23); (3) BLM violated FLPMA by failing to make a reasoned and informed decision establishing stocking rates for the whole allotment; (4) BLM violated the order in Feller v. BLM, supra, and applicable grazing regulations in engaging in "closed-door management" of the Comb Wash Allotment in issuing grazing authorizations without providing affected interests notice and the opportunity to comment on those authorizations, (Decision at 27); and (5) BLM failed to conform to the forage utilization limits of the RMP. ^{9/}

IV. Discussion

A. NEPA Violation

The first issue we will consider is whether Judge Rampton properly concluded that BLM violated NEPA in this case. The record in this case establishes, without doubt, that BLM failed to comply with NEPA.

Judge Rampton made the following findings regarding BLM's assertion that the RMP/FEIS provided adequate NEPA documentation for its grazing authorizations in the Comb Wash Allotment:

The Proposed RMP/FEIS is simply devoid of any site-specific information or analysis regarding the impacts of grazing on the

^{8/} The District Manager's determination to continue grazing at "current levels" deviated from the proscription in the RMP to permit grazing at either the "average licensed use" or "preference" level, depending on whether agreement of the permittee could be attained. "Current levels" was the annual use level established at the time of issuance of the Tribe's 10-year grazing permit in February 1989, i.e., for the initial 1989-90 season. (Ex. A-117, at 1; Tr. Vol. 17, at 119.)

^{9/} None of the Appellants mounted any challenge to Judge Rampton's rulings on establishing a stocking rate for the entire Comb Wash Allotment, affected interests, or forage utilization limits. Accordingly, we need not address those parts of his Decision.

resource values of the particular allotment in question. At best, it contains some general information regarding the impacts of grazing on the entire San Juan Resource Area as a whole. The discussion focuses upon broad descriptions of the types of vegetative zones found in the Area and the general problems of grazing management. The "Affected Environment" and the "Preferred Alternative" of the document do not mention the Comb Wash allotment other than to list it in summary tables showing such data as the number of acres, number of authorized AUM's, and number of acres in various ecological conditions.

Numerous BLM witnesses confirmed the following facts about the Proposed RMP/FEIS:

(1) That it is not useful or does not provide the detailed information necessary to determine whether to graze the canyons (Tr. Vol. 8 at 46, 53, 57-60, Vol. 17 at 42-43; Ex. A-108 at 37);

(2) That it does not contain an analysis of the 1990 proposed grazing plan or grazing system being implemented by issuance of the annual grazing authorizations nor does it contain information regarding the available forage, condition of the vegetation, or condition of the riparian areas in the canyons (Tr. Vol. 8 at 45, Vol. 17 at 103-108; Ex. R-5, Proposed RMP/FEIS, Vol. I at 1-232); and

(3) That it lacks any discussion of the relative values of the resources in the canyons and no balancing of the harms and benefits of grazing the canyons (Ex. A-108 at 30, 32-33; Tr. Vol. 9 at 196-197).

(Decision at 9.) We are in complete agreement with those findings.

Judge Rampton also pointed out that all three BLM Decisions being appealed were discretionary decisions and that NWF had not challenged the RMP/FEIS. He explained:

The Proposed RMP/FEIS is at issue because of the assertions of BLM and intervenors that the document satisfies BLM's NEPA requirements with respect to the challenged discretionary actions. It is axiomatic that when an appellant challenges an action on NEPA grounds, the reviewing tribunal must determine whether the agency's existing NEPA documentation is adequate to support that action. See Southern Oregon Citizens Against Toxic Sprays v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984) ("We review the sufficiency of the environmental analysis as a whole to determine whether it complies with NEPA."; Manatee County v. Gorsuch, 554 F. Supp. 778, 783, 788 (M.D. Fla. 1982) ("[T]he court is not limited to the review of any single environmental document, but may evaluate the entire record of the agency.").

The case of Southern Utah Wilderness Alliance, 123 IBLA 302 (1992), is instructive. In that case, appellants challenged a

BLM decision to implement certain range improvement projects in the Henry Mountains. BLM relied on a site-specific environmental assessment (EA) that was "tiered" to an area-wide EIS in finding that the decision would have no significant impact upon the human environment. The Interior Board of Land Appeals (Board) held it must examine both the site-specific EA and the area-wide EIS to determine "whether BLM has, at some level, adequately considered the environmental effects of its proposed actions." 123 IBLA at 309.

[T]o say that the Henry Mountain EA may be tiered to the Henry Mountain EIS does not resolve the issue before us. If, as in this case, implementation of a decision based on a site-specific EA will significantly affect the quality of the human environment, the effect must be analyzed and considered in an EIS. Tiering an EA to a previously completed EIS simply raises the question whether the EIS adequately addresses the environmental effects of the proposed actions, or a supplemental EIS is required because the EIS' analysis is broad and does not address specific impacts.

Id. at 306 (citations omitted) (emphasis added); see also Oregon Environmental Council v. Kunzman, 714 F.2d 901, 904-05 (9th Cir. 1983) (a site-specific EIS was required because both an EA and the programmatic EIS to which the EA was tiered were inadequate for failure to describe site-specific impacts).

The need for a detailed analysis of the site-specific resources and impacts of grazing on those resources is explicitly set forth in the case of National Resources Defense Council v. Morton, 388 F.Supp. 829 (D.D.C. 1974), aff'd, 527 F.2d 1386 (D.C. Cir. 1976) (per curiam), cert. denied, 427 U.S. 913 (1976).

(Decision at 19-20.)

In fashioning the appropriate relief for the violation of NEPA, Judge Rampton stated:

BLM has an infinite number of options, each with its own harms, benefits, and alternatives to be weighed. With respect to areas within the allotment but outside canyons, BLM may find (through preparation of an EA) that some grazing scheme, other than complete preclusion of grazing, will not significantly effect [sic] the quality of the human environment, in which case an EIS would not be necessary.

Whatever course of action BLM chooses with respect to the areas outside the canyons, an adequate environmental review is required. If BLM chooses to maintain the present grazing scheme, based loosely on the informal 4-year cyclic plan, it is clear that an EIS is required.

With respect to the canyons, the evidence shows that any level of grazing use may significantly effect [sic] the quality of the human environment, and therefore BLM is prohibited from allowing any grazing in the canyons until an adequate EIS is prepared and considered.

(Decision at 34.)

Thus, Judge Rampton precluded any grazing in the canyons pending preparation of an EIS. He did not mandate an EIS for grazing outside the canyons in the allotment. Rather, he directed that BLM pursue environmental review through preparation of an environmental assessment (EA), which, depending on the results, might lead to an EIS. However, he added one caveat. If BLM sought to perpetuate its present grazing scheme, developed in violation of FLPMA without the benefit of any public participation, he concluded that an EIS would be required. He did not prohibit grazing outside the canyons pending environmental compliance.

The BLM has not appealed Judge Rampton's ruling that it failed to comply with NEPA or the relief that he granted for such failure. Instead, in its Statement of Reasons for appeal (BLM's SOR), BLM merely states: "The BLM does not challenge Judge Rampton's conclusion that grazing cannot occur in the five canyons at issue until site-specific analysis is completed in compliance with the National Environmental Policy Act (NEPA)."

However, as noted above, Judge Rampton did more than preclude grazing in the canyons pending "site-specific analysis." He required preparation of an EIS if BLM intended again to authorize grazing in the canyons. He also required an EA for grazing outside the allotment and, if BLM intended to continue its 4-year cyclical grazing plan, an EIS. Despite the limited nature of its statement regarding what it is not challenging, the lack of any argument by BLM concerning NEPA issues necessarily leads us to conclude that it acquiesces in all of Judge Rampton's rulings in that regard.

Although the Tribe seeks reversal of Judge Rampton's Decision "because it embraces an injunction against Tribal cattle grazing made in violation of federal law," (Tribe's SOR at 18), it asserts that it "welcomes site-specific compliance" with NEPA and "agrees that all parties will be better served by a more formal analysis." Id. at 44.

The UFBF is the only Appellant contending that Judge Rampton erred in concluding that BLM failed to comply with NEPA. One of UFBF's assignments of error is predicated on its belief that Judge Rampton held the FEIS to be inadequate. "Judge Rampton, however, jumped right over the process and found the programmatic areawide EIS to be inadequate before the site specific activity plan was even completed." (UFBF's SOR at 19.)

The UFBF clearly understands the scope of the RMP/FEIS and the NEPA process. At page 7 of its SOR, it states:

A resource areawide RMP/EIS is not intended to be either grazing specific or allotment specific. Instead, it is intended to be a more generic area wide planning document which addresses

all of the multiple use issues within the resource area. It does not predetermine site-specific decisions thereby eliminating the exercise of discretion. What it is intended to do is identify resource issues and conflicts and provide the resource area managers with guidance in making the everyday site-specific decisions that are required. As Mr. Daryl Trotter, who had responsibility to oversee the NEPA and BLM planning process in the San Juan Resource Area explained, the RMP/EIS is done at what is known as the planning stage while site-specific decisions are made at what is known as the activity stage. (Tr. vol. 8 at p. 22). In fact, one of the objectives of the RMP is to identify those site-specific areas that need "to be covered by more detailed and specific plans". 43 CFR §1601.0-5(k)(5). When the need for further detailed site specific plans are [sic] identified, these plans will usually take the form of an allotment management plan ("AMP"), which will then require its own NEPA compliance documentation usually in the form of an environmental assessment. (Tr. vol. 8 at p. 23).

This going from the more generic resource area planning documents to site-specific AMPs is called "tiering" and has been specifically approved by Coun[cil] of Environmental Quality regulations detailing the steps that must be taken in NEPA compliance.

[1] However, UFBF misconstrues Judge Rampton's Decision and ignores NWF's arguments. The NWF did not challenge the RMP in this case, nor did it question the adequacy of the FEIS for purposes of supporting the RMP. What it did question at the hearing, extensively and exhaustively, was BLM's steadfast reliance, now abandoned, on those documents to support BLM's site-specific actions under appeal. It is BLM's intransigence that led Judge Rampton to examine the RMP/FEIS, because it is BLM that insisted that the FEIS satisfied its NEPA obligations with respect to the challenged grazing decisions. He properly undertook such an examination. See Southern Oregon Citizens Against Toxic Sprays v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984); Southern Utah Wilderness Alliance, 123 IBLA 302, 306 (1992).

The result of Judge Rampton's examination was not that the FEIS was inadequate to support the RMP. Instead, he found, quite properly, that the Proposed RMP/FEIS did not support BLM's site-specific actions.

[2] The UFBF discusses the procedure of "tiering" and asserts that it is proper in this case. Tiering is an appropriate method of NEPA compliance. Southern Utah Wilderness Alliance, 124 IBLA 162, 167-68 (1992); see 40 C.F.R. § 1502.20, 40 C.F.R. § 1520.28. However, tiering requires a minimum of two NEPA documents, a general environmental document and a later-developed site-specific environmental document which is tiered back to the earlier general document. No site-specific document addressing the Comb Wash Allotment has been developed by BLM since the issuance of the RMP/FEIS. Therefore, tiering at this juncture is impossible.

The UFBF believes that BLM is in compliance with NEPA, because BLM intends at some indeterminate date in the future to prepare further environmental documentation to tier back to the EIS. Judge Rampton found that BLM had a reasonable amount of time to engage in site-specific analysis, but that it failed to do so.

The UFBF states at page 35 of its SOR: "To be sure, there is no dispute that the AMP has not yet been completed and that the BLM, accordingly, has not yet concluded its tasks under NEPA. But that is a far cry from claiming that the BLM has violated NEPA." Thus, while admitting lack of compliance, UFBF would find no violation, because BLM is "in the middle of the NEPA compliance process." Id. The UFBF faults "NWF and Feller for boot-strapping themselves into a claimed violation * * *." Id.

In essence, UFBF is asserting that NWF should have waited for BLM to complete its AMP and corresponding NEPA analysis before filing any of its appeals. Such an assertion is without merit. It ignores the plain language of the District Manager's March 1991 Decision. Therein, the District Manager did not allege that BLM was "in the middle" of its NEPA compliance. He stated that the general NEPA documentation supported his site-specific actions. 10/

The UFBF also complains that Judge Rampton overstepped his authority by ordering an EIS and, thereby, eliminated the discretion afforded to BLM.

His conclusion that an EIS was necessary prior to any further grazing in the canyons was based on his finding that "appellants presented overwhelming evidence that grazing has significantly degraded and may continue to significantly degrade the quality of the human environment in the canyons." (Decision at 4.) We need not address this issue because BLM has not challenged Judge Rampton's NEPA conclusions. Therefore, we must conclude that it has consented to undertake the actions he directed.

B. FLPMA Violation

[3] The next issue for resolution is whether Judge Rampton properly held that BLM violated FLPMA. After citing section 302(a) of FLPMA,

10/ In an Apr. 5, 1991, cover letter accompanying its notice of appeal of the District Manager's Decision, NWF stated:

"We honestly believe the concerns raised in our appeal must be addressed, and that grazing on sensitive areas in the Allotment should be suspended pending resolution of these issues.

"However, we are encouraged by BLM's commitment--discussed in both the proposed and final decisions--to undertake a Combined Resource Management Process [CRMP] for the Allotment. We hope the CRMP can move forward during the appeal, and we are anxious to participate in the process. Perhaps the CRMP can resolve some of the issues raised in our appeal."

The CRM process commenced in May 1991 with a group meeting. The last meeting of the group was in January 1992. (Ex. A-107, at 2, 4.) At that time, BLM announced that an adequate EIS had already been prepared for the allotment and that BLM would not consider the alternative of discontinuing grazing in the canyons.

43 U.S.C. § 1732(a) (1994), which requires the Secretary to "manage the public lands under principles of multiple use and sustained yield," Judge Rampton quoted the FLPMA definition of "multiple use." That term is defined as

the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; * * * the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; * * * with consideration given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or greatest unit production.

43 U.S.C. § 1702(c) (1994). He then cited a statement by the court in Sierra Club v. Butz, 3 ENV'T'L L. REP. 20,292, 20,293 (9th Cir. 1973), that the multiple-use principle "requires that the values in question be informedly and rationally taken into balance." ^{11/} He concluded that an agency is required to engage in such a balancing test in order to determine whether a proposed activity is in the public interest.

However, in applying those standards to the facts in this case, Judge Rampton held that "BLM violated FLPMA by failing to make a reasoned and informed decision that the benefits of grazing the canyons outweigh the costs." (Decision at 23) (emphasis added). It is with this highlighted language that all Appellants disagree, asserting that FLPMA does not require an economic cost/benefits analysis.

It is not clear that Judge Rampton intended that BLM engage in an economic cost/benefits analysis. A reading of his Decision at pages 23-25 discloses that the sentence quoted above is the only place in his Decision where he uses the word "costs," other than in the heading to the discussion. Later in his Decision when he is addressing the appropriate relief for the various violations, he describes the violation as the failure to make a reasoned and informed decision to graze the canyons in violation of FLPMA. He mentions neither costs nor benefits. He described the appropriate relief, as follows: "Because BLM may choose to prohibit grazing in the canyons in the future, BLM is not compelled to make a reasoned and informed decision that grazing the canyons is in the public interest. However, until a decision is made, BLM is prohibited from allowing grazing in the canyons." (Decision at 34.) Again, no mention is made of benefits and costs.

^{11/} In Butz, the court was construing a similar requirement under section 2 of the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 529 (1970).

Judge Rampton's analysis of the evidence relating to BLM's decisionmaking process is as follows:

The Area Manager, Mr. Scherick, correctly believed that he had discretion under the RMP to allow or disallow grazing on the Comb Wash allotment. He testified that, in exercising this discretion, he had not considered the relative values of the resources in the canyons because consideration of those values would take place during the activity planning stage (formation of the new AMP). But a new AMP has not yet been developed because the CRMP process failed to produce consensus and BLM has yet to prepare an AMP on its own.

Mr. Scherick also admitted that neither he nor any document, including the Proposed RMP/FEIS, weighs the benefits and harms of grazing the canyons. In authorizing grazing in the canyons, Mr. Scherick simply relied upon the information and recommendations provided to him by Mr. Curtis, the range conservationist responsible for the allotment.

Contrary to the evidence and Mr. Scherick's belief, Mr. Curtis thought that the RMP had already considered the impacts of grazing on the allotment's resources and determined that the allotment should be grazed, regardless of the recognized conflict with recreational uses and the need for adjustment confirmed by monitoring. He therefore felt it was not his responsibility to consider those impacts. Mr. Scherick's reliance upon Mr. Curtis, who believed that the decision to graze had already been made and was still binding, does not constitute a rational basis for determining whether the canyons should be grazed.

Furthermore, Mr. Curtis, an expert in range management only, does not have the expertise necessary to understand all the impacts of grazing in the canyons. Yet, he testified that he relied solely upon the utilization data, the Proposed RMP/FEIS, and ocular observations to determine the specific terms under which grazing would be allowed. There is some question whether he also sought and relied upon advice from experts in archaeology and other fields, but he provided no documentation and little evidence of the context or content of any discussions with those experts.

Mr. Curtis' reliance upon the Proposed RMP/FEIS is unavailing, as he, Mr. Scherick, and Mr. Trotter, BLM's NEPA expert, each admitted that the Proposed RMP/FEIS does not contain the detailed information necessary for determining whether or not to graze the canyons. * * *

In sum, BLM's decision to graze the canyons was not reasoned or informed, but rather based upon Mr. Curtis' misinterpretation of the RMP and a totally inadequate investigation and analysis of

the condition of the canyons' varied resources and the impacts of grazing upon those resources.

(Decision at 23-25.)

We agree with that analysis. Even NWF does not argue that FLPMA requires an economic cost/benefits analysis. The NWF states: "To the extent the Judge's choice of words may be ambiguous, NWF has no objection to this Board clarifying that FLPMA does not require an economic cost-benefit analysis, but rather that BLM must informedly and rationally balance competing values." (NWF's Answer at 58.)

To the extent Judge Rampton's Decision may be construed as requiring an economic cost/benefit analysis, it is modified to make it clear that no such analysis is required.

On appeal, BLM makes no argument that it satisfied FLPMA's multiple-use mandate in authorizing grazing in the canyons. Instead, it agrees that the actions it takes, including authorizing grazing on the public lands, are required to be "in the public interest," but it asserts that if Judge Rampton intended to impose a "specific public interest determination," such as is found in section 206(a) of FLPMA, 43 U.S.C. § 1716(a) (1994), dealing with exchanges, "he has clearly overstepped his authority." (BLM's SOR at 5.) It contends that "FLPMA simply does not require a specific public interest finding in the grazing context." Id.

We agree with BLM that FLPMA does not require a "specific" public interest determination for grazing. However, FLPMA's multiple-use mandate requires that BLM balance competing resource values to ensure that public lands are managed in the manner "that will best meet the present and future needs of the American people." 43 U.S.C. § 1702(c) (1994). Indeed, all parties agree that BLM must conduct some form of balancing of competing resource values in order to comply with the statute. Counsel for BLM states that "we agree that all BLM decisions should be in the public interest as that interest is defined by Congress in law * * *." (BLM's SOR at 5.) The UFBF also recognizes that "[c]learly, management for multiple use does require a balancing and review of the relative resource values." (UFBF's SOR at 25) (emphasis added). The Tribe also "does not dispute that under FLPMA the BLM must give consideration to the relative values of the resources in the Comb Wash canyons. Moreover, we agree that those values must be rationally considered." (Tribe's SOR at 42) (emphasis added). And NWF concurs that "BLM must informedly and rationally balance competing values." (NWF's Answer at 58.)

What is important in this case, and what we affirm, is Judge Rampton's finding that BLM violated FLPMA, because it failed to engage in any reasoned or informed decisionmaking process concerning grazing in the canyons in the allotment. That process must show that BLM has balanced competing resource values to ensure that the public lands in the canyons are managed in the manner that will best meet the present and future needs of the American people.

C. Federal Trust Responsibility

The Tribe's principal contention is that, despite any failure by BLM to comply with section 102(2)(C) of NEPA and section 302(a) of FLPMA, the Department is required, in fulfillment of its trust responsibility to the Tribe to act in its best interests, to permit grazing to proceed in the canyons, and thereby encourage "tribal self-sufficiency and economic development." (Tribe's SOR at 4.)

The Tribe cites various cases, including Seminole Nation v. United States, 316 U.S. 286, 297 (1942), where the Federal Government's general duty to deal with Indian tribes according to the "most exacting fiduciary standards" is well-enshrined. However, a trust relationship, and thus the consequent fiduciary obligation, has been held to exist generally when it arises under a specific treaty, statute, agreement, or other indication that the United States intended to act as a trustee in its particular dealings with an Indian tribe. See, e.g., Whiskers v. United States, 600 F.2d 1332, 1335-37 (10th Cir. 1979), cert. denied, 444 U.S. 1078 (1980); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975); Havasupai Tribe v. United States, 752 F. Supp. 1471, 1486-87 (D. Ariz. 1990), aff'd, 943 F.2d 32 (9th Cir. 1991), cert. denied, 112A S. Ct. 1559 (1992). Accordingly, there is considerable question whether the United States has a trust responsibility in its management of grazing privileges held by an Indian tribe on non-Indian lands under the Federal grazing laws, where the record fails to show any treaty, statute, agreement, or other indication that the United States intended to act as a trustee in such matters.

However, even assuming a trust relationship exists in the present situation, no case cited by the Tribe stands for the proposition that a Federal agency may, solely because of its general trust responsibility, disregard a controlling Federal statute that clearly precludes, in the absence of compliance, a permitted activity by an Indian tribe. See Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir.) (adopting, as modified, dissenting opinion set forth at 728 F.2d 1555, 1563-73 (10th Cir. 1984)), cert. denied, 479 U.S. 970 (1986), and Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1972), rev'd on other grounds, 499 F.2d 1095 (D.C. Cir. 1974), cert. denied, 420 U.S. 962 (1975). Both Jicarilla Apache Tribe and Pyramid Lake indicate that a Federal agency, in fulfilling its trust duty, must act in accordance with other applicable legal obligations. 728 F.2d at 1567-69; 354 F. Supp. at 256. Requiring BLM to comply with the mandates of NEPA and FLPMA prior to authorizing grazing in the canyons does not violate any trust responsibility to the Tribe. Cf. Havasupai Tribe v. United States, 752 F. Supp. at 1489 (Forest Service satisfied "any general fiduciary duty it may have had to the Havasupai Tribe by complying with the NEPA statute" in approving a uranium mine on ancestral lands).

D. Prohibition Against Grazing in the Canyons

[4] The UFBF and the Tribe each contend that, even assuming that BLM failed to fulfill its duty under NEPA and FLPMA before permitting further grazing in the canyons, Judge Rampton adopted an inappropriate remedy by

precluding any grazing in the canyons until compliance was achieved. They argue that preclusion amounted to an "injunction" of an ongoing activity, based solely on the fact of the NEPA and FLPMA violations, without any consideration of the appropriate standard for such equitable relief, including deciding whether there was the threat of irreparable harm from continued grazing.

The UFBF and the Tribe cite a number of judicial cases in support of their position, particularly Northern Cheyenne Tribe v. Hodel, 842 F.2d 224 (9th Cir. 1988), and the Supreme Court cases of Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987), and Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982). ^{12/} In Northern Cheyenne, the circuit court held, relying on Amoco Production, that, unless required by statute, a court was not compelled to enjoin ongoing mineral operations under Federal coal leases merely because they had been authorized by the Department on the basis of a flawed EIS, and thus in violation of NEPA. Rather, it stated that a court must fully exercise its equitable authority, balancing the equities and considering the threat of irreparable harm from continued operations, and on that basis, declined to uphold the district court's issuance of an injunction where the record revealed that it had not properly done so. See 842 F.2d at 229-30. The UFBF and the Tribe conclude that no basis for administrative invocation of "injunctive" relief has been shown here, and thus we should overrule Judge Rampton.

The cases cited by UFBF and the Tribe are inapposite. In addressing this argument below, Judge Rampton pointed out that the power of the Office of Hearings and Appeals (OHA) does not derive from the judicial branch of Government, but from the executive branch. The authority of OHA is delegated to it from the Secretary of the Interior. 43 C.F.R. § 4.1. According to that delegation, OHA "is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department * * *." Id. Thus, an Administrative Law Judge's authority in fashioning relief following a hearing on the merits is not limited by jurisprudential constraints underlying injunctive relief analysis. Judge Rampton correctly rejected the arguments of UFBF and the Tribe. ^{13/} As

^{12/} The circuit court's initial opinion in Northern Cheyenne was later superseded. See Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152 (9th Cir. 1988). However, the substance of its pertinent holding remained unchanged. Id. at 1157-58.

^{13/} The Tribe requests that the Board "investigate what may be federal law violations triggered by * * * ex-parte communications" between the then Director of BLM and Feller and one of the witnesses for NWF, which occurred immediately prior to Judge Rampton's December 1993 Decision. (Tribe's SOR at 7, n.2.) We decline to do so. The "federal law," to which the Tribe refers, is 5 U.S.C. § 557(d)(1) (1994) and the Department's implementing regulation, 43 C.F.R. § 4.27(b). Like Judge Rampton, to whom this matter was initially presented, we can discern no possible violation. See Decision at 3.

this Board has held on a number of occasions, when BLM authorizes an action without fulfilling its NEPA mandates, that authorization may be overturned and the case remanded for further environmental evaluation. See, e.g., Oregon Natural Desert Association, 125 IBLA 52, 62 (1993); Southern Utah Wilderness Alliance, 124 IBLA 162, 170 (1992); Sierra Club Legal Defense Fund, Inc., 124 IBLA 130, 142 (1992).

Judge Rampton found that BLM had violated NEPA by not preparing a site-specific analysis of the impact of grazing on the canyons in the allotment. He also found, based on the evidence presented by NWF, which he characterized as "overwhelming," that grazing had significantly degraded the human environment in the canyons and that grazing might continue to do so. Based on those findings, Judge Rampton properly granted NWF the relief it sought—the preclusion of grazing in the canyons pending the preparation and consideration of an EIS. The BLM has raised no objection to Judge Rampton's imposition of that duty on it.

Except to the extent that they have been expressly or impliedly addressed in this Decision, all other errors of fact or law raised by the Appellants are rejected on the ground that they are, in whole or in part, contrary to the facts and law or immaterial. See National Labor Relations Board v. Sharples Chemicals, 209 F.2d 645, 652 (6th Cir. 1954); Glacier-Two Medicine Alliance, 88 IBLA 133, 156 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed as modified.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge

fn. 13 (continued)

The proscription against ex parte communications, arising in proceedings before OHA, including pending appeals, extends only to those communications

"concerning the merits of a proceeding between any party to the proceeding or any person interested in the proceeding or any representative of a party or interested person and any Office [of Hearings and Appeals] personnel involved or who may reasonably be expected to become involved in the decisionmaking process on that proceeding[.]"

43 C.F.R. § 4.27(b) (emphasis added). The Director of BLM was not an employee of OHA who was involved or reasonably expected to become involved in decisionmaking regarding the appeal pending before the judge at the time of the reported communications. Thus, they were clearly not proscribed. Brock Livestock Co., 101 IBLA 91, 96 (1988).